IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY
&
THE HONOURABLE MRS. JUSTICE K.HEMA

TUESDAY, THE 11TH DECEMBER 2007 / 20TH AGRAHAYANA 1929

Crl.MC.No. 582 of 2007()

PETITIONER:

SUKUMARAN, AGED 57 YEARS,
CONVICT NO.9196, CENTRAL PRISON,
THIRUVANANTHAPURAM.

BY ADV. SRI.SAJEEV.T.P.

RESPONDENTS:
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1. STATE OF KERALA, REPRESENTED BY
CHIEF SECRETARY, SECRETARIAT,
THIRUVANANTHAPURAM.

2. SUPERINTENDENT OF PRISON,
CENTRAL PRISON, THIRUVANANTHAPURAM,
THROUGH PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.K.C.SANTHOSH KUMAR

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON 11.12.2007, ALONG WITH CRMC NO. 1428 OF 2007 THE COURT ON 11/12/2007 PASSED THE FOLLOWING:

R. BASANT, J.

CRL.M.C.NOs.582 & 1428 OF 2007

Dated this the 8th day of June, 2007

ORDER OF REFERENCE

Does the dictum in **Subramanian Vs. State of Kerala** (1983 KLT 452) stand overruled by the observations of the Supreme Court in **M.R. Kudva Vs. State of Andhra Pradesh** (2007 (1) Crimes 50 (SC))? This is the question that arises for consideration. A Division Bench of this Court had very clearly held that an independent application under Sec.482 of the Cr.P.C. claiming the benefit of Sec.427 of the Cr.P.C. in a matter already disposed of is absolutely maintainable. The law on the point has been discussed in detail.

2. The relevant para of the Supreme Court decision in **M.R. Kudva Vs. State of Andhra Pradesh** (2007 (1) Crimes 50 (SC)) is extracted below:

> "12. However, in this case the provision of Section 427 of the Code was not invoked in the original cases or in

the appeals. A separate application was filed before the High Court after the special leave petitions were dismissed. Such an application, in our opinion, was not maintainable. The High Court could not have exercised its inherent jurisdiction in a case of this nature as it had not exercised such jurisdiction while passing the judgments in appeal. Section 482 of the Code was, therefore, not an appropriate remedy having regard to the fact that neither the Trial Judge, nor the High Court while passing the judgments of conviction and sentence indicated that the sentences passed against the appellant in both the cases shall run concurrently or Section 427 would be attracted. The said provision, therefore, could not be applied in a separate and independent proceeding by the High Court. The appeal being devoid of any merit is dismissed."

(emphasis supplied)

3. There is a dispute between the learned counsel for the petitioners on the one side and the learned Public Prosecutor on the other on this crucial aspect. While the learned counsel for the petitioners contend that the observations made by the Supreme Court must be reckoned as limited to the facts of the case where the High Court and the Supreme Court had occasion earlier to consider the matter, the decision of the Division Bench must prevail when the Supreme Court has not earlier considered the question. It is true that the Supreme Court has not considered the question in greater detail in para-12 and many of the points/issues considered in **Subramanian Vs. State of Kerala** (1983 KLT 452) have not been considered by the Supreme Court. The crucial question then is whether the decision in **Subramanian Vs. State of Kerala** (1983 KLT 452) survives in view of the observations in **M.R. Kudva Vs. State of Andhra Pradesh** (2007 (1) Crimes 50 (SC)). The matter is one of public importance. It has come to the stay as a practice in this Court for the accused facing sentences in plurality of cases to come before this Court and claim concurrency under

Sec.427 of the Cr.P.C. I am of opinion that it will be ideal and appropriate to refer the matter for decision of a Division Bench. Authentic pronouncement of a Division Bench is necessary in the circumstances, I feel.

4. In the result, this matter is adjourned for consideration by a Division Bench under Sec.3 of the Kerala High Court Act.

(R. BASANT, JUDGE)

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